11 USC § 503(b)
ORS 465.255

Gull Industries, Inc. v. Hanna BAP No. OR-92-2283-VMeJ
cross appeal BAP No. OR-92-2285-VMeJ
Adv No 90-3388-S
In re Hanna Case No 390-33990-S11

6/15/94 BAP aff'g DDS Published

The bankruptcy court allowed plaintiffs an unsecured claim for remediation costs incurred to clean the petroleum from the ground water. The petroleum migrated from the debtor's property. The bankruptcy court denied the request for administrative priority because the petroleum leaked from the tanks prepetition and the remediation efforts did not significantly reduce the contamination on the debtor's property.

Both parties appealed. The BAP affirmed both the allowance of the claim and the denial of administrative status. Two members of the panel focussed on the finding that the petroleum leaked from the debtor's tanks prepetition, and concluded that the damage was deemed to have occurred prepetition under bankruptcy law. They also affirmed the bankruptcy court's determination that the plaintiff's efforts constituted remedial action even though they may not have been cost effective or permanently cleaned the groundwater until the debtor's property was cleaned.

Judge Volinn filed a dissenting opinion. He concluded that plaintiffs were entitled to an administrative claim for the postpetition costs under Oregon law because they were injured by the ongoing release of petroleum from property of the estate, and

the estate was obligated to remove the petroleum.

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-92-2283-VMeJ
	OR-92-2285-VMeJ
DANIEL C. HANNA,	(Cross Appeal)
Debtor.	Bankruptcy No. 390-33990-S11
GULL INDUSTRIES, INC., an Oregon corporation, and BP OIL COMPANY, an Ohio corporation,	Adversary No. 90-3388S
Appellants / Cross-Appellees,	
v.	OPINION
JOHN MITCHELL, INC., Trustee of the Estate of Daniel C. Hanna and DANIEL C. HANNA,	
Appellees / Cross-Appellants.	

Argued and Submitted on July 22, 1993
at Portland, Oregon

Filed - JUN 15 1994

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: VOLINN, MEYERS, and JONES, Bankruptcy Judges.

JONES, Bankruptcy Judge:

BACKGROUND

The debtor, Daniel C. Hanna ("Hanna"), and appellant, Gull Industries, Inc. ("Gull"), owned adjacent filling stations in Gresham, Oregon. Both filling stations leaked petroleum products into the soil, causing contamination. However, only Hanna's leakage reached the groundwater. The contamination of the groundwater is apparently a slow, continuing process which occurs after the soil is saturated with petroleum.

Gull began cleaning up its site in August 1989, in conjunction with the sale of its property to BP Oil Company ("BP"). That sales agreement required Gull to clean up environmental damage to the site according to a specific timetable. Findings of Fact and Conclusions of Law (4-7-92) at 7. Gull hired Applied Geotechnology, Inc. ("AGI") to perform a site assessment and cleanup which eventually cost about $130,000. AGI determined that the groundwater beneath the Gull site was contaminated by one to three inches of free petroleum product. The bankruptcy court found that "Gull asserted and proved at trial that contaminated subsurface water continued to migrate to its land from the polluted Hanna land. . . ." Findings (4-7-92) at 3.

After beginning its remediation efforts by installing three twenty-four inch recovery wells on the Gull site in June 1990, Gull demanded that Hanna stop the flow of contamination from the

Hanna site to the Gull site.[1] About a week later on July 27, 1990, Hanna filed for relief under Chapter 11. Three days later the bankruptcy court appointed John Mitchell, Inc. ("Mitchell), as Chapter 11 trustee.

Gull continued its remediation efforts by installing an "air stripper" to clean the groundwater, and on August 24, 1990, brought an adversary complaint seeking injunctive relief and tort damages under Oregon Revised Statute § 465.255. Gull asked that these claims be treated as administrative expenses under 11 U.S.C. § 503.[2]

In October 1990, Mitchell emptied the leaking underground storage tanks on Hanna's site, and in April 1991 removed them; however, he failed to remove the underlying contaminated soil or to perform a site study as directed by the bankruptcy court in its December 13, 1990 order.

On April 7, 1992, the bankruptcy court denied administrative status but concluded that Gull's expenses were "remedial action costs" recoverable as a general unsecured claim under O.R.S. § 465.255. Gull now appeals the denial of administrative status, and Mitchell cross-appeals the granting of the general unsecured claim. We affirm both.

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[1] Similar demands were made by the Oregon Department Of Environmental Quality ("ODEQ") before and after the filing of the bankruptcy petition.

[2] Unless otherwise indicated, all statutory citations refer to the Bankruptcy Code, 11 U.S.C. sections 101 to 1330.

STANDARD OF REVIEW

We review for an abuse of discretion the bankruptcy court's award or denial of administrative claims pursuant to 11 U.S.C. § 503(b)(1)(A). See In re Dant & Russell, Inc., 853 F.2d 700, 707 (9th Cir. 1988). In general, we review findings of fact for clear error and conclusions of law de novo. E.g., In re Comer, 723 F.2d 737, 739 (9th Cir. 1984).

ISSUES PRESENTED

1. Whether Gull's cleanup costs performed on property not owned by the estate and relating to pre-petition damages are entitled to § 503(b)(1)(A) administrative expense status.

2. Whether the bankruptcy court erred as a matter of fact or law in granting Gull an unsecured claim for its cleanup costs.

DISCUSSION

We construe § 503(b)(1)(A) strictly. E.g., In re Catalina Spa & R.V. Resort, Ltd., 97 B.R. 13, 17 (Bankr. S.D. Cal. 1989) (citing Standard Oil Co. v. Kurtz, 330 F.2d 178, 180 (8th Cir. 1964)). The applicant must prove by a preponderance of the evidence entitlement to the administrative expense. Id. (citing In re Patch Graphics, 58 B.R. 743, 746 (Bankr. W.D. Wis. 1986)).

Administrative status is allowed when a claim (1) is incurred postpetition, (2) directly and substantially benefits the estate, and (3) is an actual and necessary expense. E.g., In re Great Northern Forest Prods., Inc., 135 B.R. 46, 60 (Bankr. W.D. Mich. 1991). We affirm based on the first element

and therefore do not address the other two.

1. Damages Caused Pre-Petition

Although the bankruptcy court's findings of fact and conclusions of law raise some questions, the court clearly found that the petroleum leaks on the Hanna property occurred pre-petition, and that neither Hanna nor Mitchell "added any significant new contamination to the Hanna land postpetition." Findings (4-7-92) at 2-7.

As noted above, the bankruptcy court also found:

> Gull asserted and proved at trial that contaminated subsurface water continued to migrate to its land from the polluted Hanna land. . . .

Findings (4-7-92) at 3. The apparent inconsistency in these findings is resolved through the court's citation to In re Jensen, 127 B.R. 27 (9th Cir. BAP 1991), aff'd, 995 F.2d 925 (9th Cir. 1993).[3]

In Jensen, the BAP discussed when claims arise for purposes of dischargeability.[4] The BAP held that the estate's cost-recovery claim was dischargeable because it arose from the debtor's

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[3] Mitchell argues that insufficient evidence was presented to determine that the Hanna release leached into the groundwater, and that the court made an impermissible presumption of causation. This is incorrect. The court heard testimony from AGI who believed that the groundwater contamination originated at the Hanna site. There was no contradictory evidence offered. The court is permitted to give weight to expert testimony. Fed.R.Evid. 702.

[4] The Jensen analysis is not limited to dischargeability cases, but rather is also useful for purposes of determining administrative status. Ohio v. Kovacs, 469 U.S. 274 (1985), relied on by the dissent, also deals with dischargeability issues.

prepetition actions even though the state's right to recover did not arise until postpetition when it cleaned up the site. 127 B.R. at 33.

Jensen cites as authoritative In re Chateaugay Corp., 112 B.R. 513 (S.D.N.Y. 1990), aff'd, 944 F.2d 997 (2d Cir. 1991), for the proposition that a claim arises upon the actual or threatened release of hazardous waste by the debtor. Consequently, if a tort occurs prepetition, with the injury occurring postpetition, such claim is deemed to have arisen prepetition. Jensen, 127 B.R. at 33 (citing Chateaugay, 112 B.R. at 522). In other words, so long as a prepetition triggering event had occurred, the claim was dischargeable regardless of when the claim for relief was ripe for adjudication. Chateaugay, 112 B.R. at 522.

In the instant case the bankruptcy court identified the acts giving rise to the alleged liability as the petroleum spills from the underground storage tanks into the soil. The later leaching from the soil to the groundwater required no activity by Mitchell, but was rather "passive." See Findings (4-7-92) at 5. Consequently, the bankruptcy court found that all environmental damage was deemed to have occurred pre-petition. See id. We agree.

The Ninth Circuit has held that "damages caused during the pre-petition period are not entitled to administrative expense priority." Dant, 853 F.2d at 709. Dant also held that "consequent damage" occurring postpetition should be regarded as having occurred

prepetition. Id.[5]

For all practical purposes, the instant appeal is equivalent to Dant. In Dant, a pre-petition debtor operated a wood treatment plant on land partially owned by the debtor and partially leased from the Burlington Northern Railroad Company. The wood treatment facility operated for over a decade and caused massive toxic waste contamination on both properties, including significant concentrations of PCP in the groundwater. The pre-petition debtor clearly caused the pollution to both properties.

Burlington Northern spent approximately $250,000 under a separate agreement with the EPA to clean up its property. Burlington requested that these cleanup costs be given administrative expense status, which request was denied for two reasons: (1) because the damages occurred pre-petition; and (2) because the remedial efforts occurred off-site on property not owned by the bankruptcy estate. Dant, 853 F.2d at 709. See also Ohio v. Kovacs, 469 U.S. 274 (1985)). The Dant court reasoned, pursuant to § 503(b)(1)(A), that the off-site remediation had not

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[5] Jensen and Dant are Ninth Circuit and BAP opinions interpreting the Bankruptcy Code. These opinions are not affected by the idiosyncracies of state law, such as O.R.S. § 465.255, which, according to the dissent, contradicts Jensen and Dant. We find no contradiction--Dant having applied Oregon law--but in the event of a disagreement between the Bankruptcy Code and the Oregon Code, the former must prevail. See also discussion, infra at 8-9. We do not disagree with the dissent's insistence that a trustee must comply with state environmental laws. If such laws have been violated, appropriate remedies are available outside of the bankruptcy context. However, the narrow issue before this panel is whether Gull's cleanup costs should be given administrative priority under the Bankruptcy Code.

been shown to be for "the actual, necessary costs and expenses of preserving the estate. . . ." Dant, 853 F.2d at 709. Gull has cited no case wherein off-site cleanup costs were given administrative expense status.

In light of Dant, the bankruptcy court did not abuse its discretion in denying Gull administrative expense status for the continuing effects of pre-petition damages. See e.g., In re Bill's Coal Co., 124 B.R. 827, 829-830 (D. Kan. 1991).

2. Policy Considerations

Gull argues that its $130,000 claim should be allowed as an administrative expense as a matter of environmental protection policy. Gull's argument fails to recognize the conflicting authority articulated by the Ninth Circuit that "[a]lthough [the creditor] asserts that public policy considerations entitled its claims for cleanup costs to administrative expense priority, we acknowledge that Congress alone fixes priorities . . . . Courts are not free to formulate their own rules of super or sub-priorities within a specifically enumerated class." Dant, 853 F.2d at 709 (citations omitted); see also Jensen, 127 B.R. at 33.

Dant, a case dealing with Oregon law, concluded with the following statement:

> [A] State may protect its interests in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims. But until the Oregon legislature enacts such protective provisions or until Congress amends sections 503 and 507 to give priority to claims for cleanup costs, we are without authority to create such a priority.

Dant, 853 F.2d at 709 (citations omitted). Consequently, we cannot grant the requested relief as a matter of policy.

3. Cross-Appeal

Mitchell argues that Gull's claim should not be allowed because it failed to follow the guidelines issued by the ODEQ in its cleanup efforts, and that its efforts were not reasonable as required by the statute. Mitchell also disputes the court's alternative theory of liability based on trespass. Because we affirm based on the former, we do not address the latter.

Mitchell asserts that Gull did not follow applicable rules governing remedial actions in containing the gasoline plume. Pursuant to O.R.S. § 465.200(15), Mitchell believes that, by definition, an allowable claim must be "consistent with a permanent remedial action." The court found that Gull's actions could be consistent, and the trustee asserts that therein lies the error.

However, the definition of remediation goes on to state that remediation includes actions "taken instead of or in addition to removal actions . . . to minimize the release . . . so that it does not migrate to cause substantial danger . . . ." Because the court found that Gull's actions slowed the spread of the plume, it appears that its actions fit the statute. Although Gull's particular actions are not listed in the statute, the statute expressly states that the list is not exclusive. Nor does the statute require that an action be cost effective. Thus, even though the court was not convinced that

the action was cost effective, it did not err in concluding that the action was remedial under the statute.

CONCLUSION

The bankruptcy court found that the environmental damage caused to the Hanna site occurred prepetition, including the continuing effects of prepetition damages, and that cleanup costs relating to prepetition damages were not entitled to administrative expense priority. Gull has failed to show that these findings of fact and conclusions of law were erroneous. Gull has also failed to show that this panel should go beyond the facts and law relevant to this case based on policy considerations.

The bankruptcy court found that Gull's efforts were remedial and benefitted the public, and that Gull was therefore entitled to a general unsecured claim. Mitchell has failed to show that the bankruptcy court erred in these findings and conclusions.

Accordingly, we affirm the bankruptcy court's denial of administrative expense status and its grant of a general unsecured claim to Gull.

VOLINN, Bankruptcy Judge, Dissenting:

BACKGROUND FACTS

The debtor, Daniel C. Hanna, and appellant Gull Industries operated filling stations on adjacent parcels of land in Gresham, Oregon. Prior to the bankruptcy, Gull sold its filling station to appellant BP Oil Company. In the contract, appellants (collectively referred to as Gull) allocated the cost of any environmental remediation of the site between themselves.

In August of 1989, approximately one year prior to Hanna's bankruptcy filing, Gull hired AGI, an environmental consultant, to inspect the site. AGI discovered one to three inches of free petroleum product on the surface of the groundwater some 18 feet beneath the site. It concluded that the petroleum contaminating the groundwater had originated uphill on Hanna's property to the east of the Gull site, migrating downhill into the Gull property. AGI also discovered soil contamination at the Gull site. It determined, however, that the material in this contaminated soil had not leached down to a level where it would contaminate the groundwater.[6]

In April 1990, the Oregon Department of Environmental Quality (the ODEQ) directed Hanna to perform a site assessment, but Hanna took no action. In June 1990, Gull began remediation on its own site by commencing installation of three large

[6]Gull removed this material, but the cost of doing so is not involved in its claim against the estate.

diameter recovery wells. On July 19, 1990, Gull demanded of Hanna that he clean up his site to stop the migration of contamination onto the Gull site. Hanna did not respond to the demand, and, on July 27, filed a petition under Chapter 11 of the Bankruptcy Code. A trustee was appointed on July 30, 1990.

PROCEEDINGS AFTER BANKRUPTCY

After the bankruptcy petition was filed, Gull took substantial additional remedial actions. From August through October, it purchased, installed and operated a vapor extraction system to clean the contaminated groundwater and continued with operation of the previously installed recovery wells. On August 24, 1990 Gull filed an adversary complaint in Hanna's bankruptcy for an injunction and an administrative priority damage claim. On December 13, 1990, the trial court signed a stipulated order in the adversary proceeding issuing an injunction prohibiting the trustee from storing any new petroleum at its site and directing the trustee to comply with Oregon's hazardous waste statute, O.R.S. § 465.200 et seq.[7] The trustee emptied the Hanna underground storage tanks in October 1990 and removed them in April of 1991.[8] He did not, however, remove any of the existing contaminated soil that had been determined by AGI to be

[7]Relevant portions of the statute are quoted infra.

[8]Both filling stations are presently closed. The Hanna property was transferred to another entity in accordance with the confirmed plan of reorganization in the debtor's Chapter 11.

the source of the contamination on the groundwater under Gull's premises.

THE COURT'S FINDINGS AND CONCLUSIONS

On April 7, 1991, the court signed an order denying Gull an administrative claim. The court found that Gull proved that contaminated subsurface water continued to migrate under Gull's site after the trustee's initial action. It found that Gull's cleanup efforts did not significantly contribute to reduction of contamination of the Hanna site, and therefore, that Gull did not prove that its efforts reduced the cost that the estate would incur to clean up its own property.

The court also found that the release from Hanna's underground storage tank occurred prepetition, and that the trustee acted reasonably in shutting down operations, even though he did not pursue cleanup of the resulting contamination. It found that the trustee as postpetition successor to the debtor was not reckless, negligent, nor strictly liable in his postpetition conduct and concluded that there was no postpetition trespass. Finally, it found that Gull was not specially damaged by the debtor's release of contaminant into the groundwater any more than the public at large, except for the effect of the contamination on the sale price of the property between Gull and BP.[9]

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[9]Although not stated by the court, this finding appears to relate to the viability of a nuisance claim--nuisance requires a showing of more than a lowering of the value of the property.

On October 29, 1992, the court entered supplemental findings of fact and conclusions of law. The court found that Gull's efforts cleaned the groundwater but did not eliminate the source. It found that Gull's costs were caused by Hanna, and Hanna was liable because Oregon's hazardous waste statute, O.R.S. § 465.200 et seq., imposes strict liability. It concluded that Gull's efforts, which it performed on the advice of experts, were reasonable. The court also concluded that while Gull's efforts did not follow the DEQ's administrative rules, the efforts were reimbursable under the statute, although the court was not convinced that the actions were cost effective or permanent.

The court also held the debtor liable in the alternative for trespass because the contamination had affected the sale price of the property, although it found that the groundwater did not specially harm Gull any more than the public at large, since it did not use the groundwater at the site. The court allowed Gull a general unsecured claim for $129,420; of this, Gull's costs expended prepetition were some $47,452 while its postpetition expenditures amounted to $81,968. As indicated, Gull appealed the denial of first priority administrative status for its claim; the trustee cross-appealed imposition of liability for Gull's costs as an unsecured claim.

ISSUE PRESENTED

The central issue presented by this appeal is whether a bankruptcy estate is subject to an administrative claim for off-

site remediation costs resulting from failure to clean up polluting material on estate property which is a source of contamination of neighboring property. Gull argues that when the court denied administrative priority to Gull's claim, the court abused its discretion by failing to recognize that Gull's cleanup costs, although not expended in direct remediation on Hanna's site, benefitted the estate because postpetition, the estate was obligated to remediate off-site consequences of the release, including the effect on Gull's site.[10] On cross-appeal, the trustee claims that the trial court erred by awarding Gull an unsecured claim under the hazardous waste statute and the common law of trespass, and that the court's factual finding that the Hanna release contaminated the groundwater was clearly erroneous.

DISCUSSION

I

The facts in this case, with one significant distinction, are similar to facts considered by In re Dant & Russell, 853 F.2d 700 (9th Cir. 1988).[11] In Dant & Russell, the debtor's

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[10]Gull also argues that its operation of the vapor extraction system is in fact remediating pollution at the Hanna site. Gull asserts that the system is extracting pollution from the groundwater under the Hanna site itself. The court made no finding in this respect.

[11]In re Jensen, 995 F.2d 925 (9th Cir. 1993) citing Dant & Russell, and cited by the majority, is inapposite. In Jensen, the issue was dischargeability, or postpetition liability of the debtor for its prepetition conduct: liability of the trustee or (continued...)

lessor, Burlington Northern (BN), applied for administrative expense status for past and future cleanup costs caused by the debtor's prepetition activities when the debtor occupied the property. The court determined that 11 U.S.C. § 503(b), which allows administrative priority for "actual, necessary costs and expenses of preserving the estate" must be construed narrowly in order to preserve the estate for the benefit of all unsecured creditors. After determining that the debtor postpetition had no interest in the lessor's property, the court denied administrative priority to the lessor's claim. Here, the debtor's interest in the estate continued in his capacity as debtor in possession to whose interests the trustee has succeeded.

In the present case, the bankruptcy judge found that contaminants continue to leach from the polluted soil on the Hanna site postpetition. In Dant & Russell, "most, if not all," of the contamination on BN's land occurred prepetition. In re Dant & Russell, 67 B.R. 360, 364 (D. Or. 1986). Moreover, there is no indication in any of the three Dant & Russell opinions[12] that the pollution on BN's land was caused by leaching from the debtor's adjoining property, either before or after filing of the bankruptcy.

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[11](...continued)
the estate for breach of a distinct postpetition duty was not at issue, as is the case here.

[12]61 B.R. 668 (Bankr. D. Or. 1985); 67 B.R. 360 (D. Or. 1986); 853 F.2d 700 (9th Cir. 1988).

In the instant case, the cause of the cleanup costs originated on property owned and controlled by the debtor in possession after the filing of the petition and until its ultimate turnover to another entity on plan confirmation. These circumstances differ significantly from those existing in Dant & Russell, where the debtor and the property were not involved with the bankruptcy estate.

II

The United States Supreme Court has considered the interface of environmental and bankruptcy law in circumstances which provide guidance here. In Ohio v. Kovacs, 469 U.S. 274 (1985), the state had initiated action to collect from Kovacs the cost of pollution cleanup of debtor's property. The debtor's business was placed in state receivership. The Supreme Court determined that the state's attempt to collect from the individual debtor the cost of cleanup of the business was a claim dischargeable in bankruptcy. The claim was based on the debtor's failure to comply with a prepetition injunction to clean up hazardous waste. Because the receivership had already dispossessed the debtor from the property prior to his bankruptcy, the state's only remedy against him was for money damages, and the court therefore held that the remedy constituted a general unsecured claim for money against the debtor subject to discharge.

While the Kovacs court was presented with the liability of the individual debtor and not with the estate's postpetition

liability, it nevertheless alluded to the postpetition liability of the current operator of the property (as is the case here where the trustee controlled the property prior to its turnover to another entity on confirmation of the plan). The court stated:

> Finally, we do not question that anyone in possession of the site--whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee--must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.

Id. at 285.[13]

Although the court declined to address the legal consequences which would have ensued had the debtor taken bankruptcy before appointment of the receiver, it nevertheless hypothesized that:

> If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

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[13]The foregoing language was adopted by Matter of CMC Heartland Partners, 966 F.2d 1143, 1147 (7th Cir. 1992), which held that although the EPA's claim against the debtor for prepetition contamination had been time-barred by the EPA's failure to file a proof of claim, this would not bar an independent postpetition claim against the reorganized debtor based on its status as owner of contaminated land. Accord, In re Torwico Electronics, Inc., 8 F.3d 146 (3rd Cir. 1993).

Id. at 284-285 n.12.[14]

In a subsequent case, the Supreme Court restricted the trustee's right to abandon contaminated property, underscoring a trustee's liability as a property owner. Midlantic Nat. Bank v. N.J. Dept. of E.P., 474 U.S. 494 (1986). In Midlantic, the court determined that a bankruptcy trustee cannot abandon property that has negative value, basing its decision in part on 28 U.S.C. § 959(b), which imposes a duty on the trustee to manage and operate estate property in compliance with state law. While abandonment is not an issue presented here,[15] the basis for the Midlantic decision is pertinent. Since a trustee cannot abandon property to circumvent a statutory duty, a fortiori, a trustee occupying property which he does not wish to abandon should not disregard or abdicate his duty under state law.

The majority states that it relies on In re Jensen, supra herein, footnote 6, which "cited as authoritative," In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991). Chateaugay, which discussed in depth the nature of pre-petition claims in bankruptcy in the particular context we are concerned with here,

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[14]This hypothesis may have relevance here since the confirmed plan has transferred the property. However, the record does not indicate the present status of the Hanna property.

[15]The trial court stated that "Mitchell [the trustee] believes that the land is worth more than the clean-up."

affirmed the trial court's ruling that post-petition remedial claims are to be accorded priority administrative status.[16]

Taken together, Kovacs and Midlantic impose legal obligations on a bankruptcy estate regardless of the dischargeability of the debtor's liability. To hold otherwise would not only allow a debtor to shift costs to the taxpaying public or innocent third parties, but would grant the debtor in

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[16]Chateaugay, at page 1009, stated:

> The Bankruptcy Code accords an administrative priority to "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A) (1988). The District Court ruled that all clean-up costs assessed post-petition with respect to sites currently owned by LTV where there has been a pre-petition release or threatened release of hazardous wastes will be entitled to administrative priority. LTV and the unsecured creditors challenge this ruling, viewing it as an unwarranted attempt to convert pre-petition contingent claims into priority claims by the simple expedient of liquidating them, i.e., incurring response costs and securing reimbursement. EPA contends that response costs paid during administration with respect to pre-petition releases or threatened releases are necessary to preserve the estate in the sense that they enable the estate to maintain itself in compliance with applicable environmental laws. The Equity Holders urge that decision as to whether reimbursement for any response costs is entitled to administrative priority cannot be made until there has been a careful assessment of the facts peculiar to each payment.
>
> The District Court drew support for its ruling from the Supreme Court's decision in Midlantic, which ruled that a bankruptcy trustee could not abandon property in contravention of state or local laws designed to protect public health or safety. If property on which toxic substances pose a significant hazard to public health cannot be abandoned, it must the [sic] follow, the Court reasoned, that expenses to remove the threat posed by such substances are necessary to preserve the estate. We agree, as have other courts considering the same issue. See In re Wall Tube & Metal Products Co., 831 F.2d 118, 123-24 (6th Cir. 1987); In re Peerless Plating Co., 70 B.R. 943, 948-49 (Bankr. W.D.Mich. 1987); In re Stevens, 68 B.R. 774, 783 (D.Me. 1987); see also In re Smith-Douglass, Inc., 856 F.2d 12, 17 (4th Cir. 1988).

possession or trustee immunity to laws enacted to protect the public safety.

III

Although the majority is correct that the postpetition leaching is a consequential damage caused by the prepetition rupture of Hanna's underground storage tanks, Oregon's hazardous waste statute creates a present liability on the landowner for failure to abate it. The court found the debtor liable to Gull under O.R.S. § 465.255. The relevant portion of that statute states:

> (1) The following persons shall be strictly liable for those remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release:
>
> (a) Any owner or operator at or during the time of the acts or omissions that resulted in the release.

O.R.S. § 465.255(a)(1993).[17]

The present owner of the property, in this case the trustee of the debtor in possession, cannot escape remediation obligations imposed by the law of the state by arguing that the debtor has been discharged from past and future obligations arising out of his prepetition conduct. Matter of CMC Heartland

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[17]Subsection (b) of § 465.255 imposes strict liability on: "(b) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in the release, and who knew or reasonably should have known of the release when the person first became the owner or operator." (emphasis added). This subsection may impose successor liability on a bankruptcy trustee for all remediation costs, whether incurred prepetition or postpetition.

Partners, 966 F.2d 1143. Gull has a private right of action against any owner or operator of the property, not solely against the owner or operator whose conduct initially created the problem. The trustee is an owner or operator and consequently is burdened with strict liability for all costs related to present releases. The trustee is equally as liable under the statute as any other owner or operator would be. The issue before us is whether, under the circumstances, Gull has demonstrated that its off-site efforts are compensable under the statute.

IV

In its April 7 Findings of Fact and Conclusions of Law, the trial court concluded, "The State of Oregon cannot create an administrative priority for bankruptcy purposes by enacting a statute that imposes strict liability for the claims of a neighbor arising from prepetition conduct of the debtor. Dant & Russell, 853 F.2d at 709." As noted above, reliance on Dant & Russell is misplaced because here the claim is based on liability arising from the trustee's knowing failure to observe a duty imposed on him by the Oregon statute with respect to property owned by the estate. Clearly, the State of Oregon can impose liabilities based on property ownership that extend to a bankruptcy trustee. See California State Board of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 853-54 (1989):

> "[b]y the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property," and that "there is nothing in that to withdraw it from the necessity

of protection by the State and municipality, or which should exempt it from its obligations to either." (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)).

O.R.S. § 465.200(14)(1993) defines release as:

"[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . . ." (emphasis added).

While the court found correctly that the trustee's passive failure to remove the soil was not culpable as trespass, it did not address the trustee's postbankruptcy conduct under § 465.255(1)(d) which imposes strict liability for omissions. An omission is "the neglect to perform what the law requires. The intentional or unintentional failure to act to act . . . ." Black's Law Dictionary (6th ed. 1990).

As quoted above, the definition of release in O.R.S. § 465.200(14) which includes "escaping and leaching" imposes liability for non-action as well; a party does not act in regard to escaping or leaching, but rather fails to act to abate it, thereby permitting the escaping or leaching to occur. The statute therefore imposes a duty on the owner of a facility to remove the source of the leaching. The trustee's failure to clean up the soil permitted or resulted in a leaching type of release, which ultimately took the form of a migratory and invasive "plume" as the trial court described it.

As indicated, the trustee failed to act not only in derogation of a statutory duty to remove the soil, but in the face of a court order to do so. Until soil removal is

accomplished, the statute imposes strict liability on the trustee for the efforts of the state or any other person who engages in remedial action, such as Gull, whose actions are currently retarding the plume of gasoline in the groundwater. This duty must be promptly performed since migratory pollution, as indicated in the record here, would proceed inexorably without preventive action. The purpose of environmental statutes is to encourage expeditious treatment of the problem so as to forestall further damage.

Oregon's hazardous waste statute is drafted broadly to effect such prompt preventive action and imposes liability on a property owner for the cost of preventive off-site remediation. Consequently, Gull's appropriate off-site response gives rise to a cause of action thereunder. "Remedial action" is defined in O.R.S. § 465.200(15)(1993) to mean:

> "[T]hose actions consistent with a permanent remedial action taken instead of or <u>in addition to</u> removal actions in the event of a release or threatened release of a hazardous substance into the environment, <u>to prevent or minimize the release of a hazardous substance so that it does not migrate</u> to cause substantial danger to present or future public health, safety, welfare or the environment." (emphasis supplied).

On the date of the filing of the petition, Hanna's estate received the contaminated property along with all concomitant obligations to manage it as the law required and liability for failure to do so. Liability of the trustee as the owner of the property therefore is predicated on the continuous release of contaminants in the remaining soil that the court found

continues to leach into the groundwater and downhill. It is clear from the court's findings of fact that, at the date of the filing of the petition, gasoline was leaching out of the contaminated soil on the Hanna site into the groundwater and that Gull was containing its spread. The court's statements, taken variously from its April 7 and October 29 findings state:

> The ground under the [Hanna] tanks was seriously contaminated by gasoline.

Findings of Fact and Conclusions of Law at 3 (April 7, 1992).

> Gull asserted and proved at trial that contaminated subsurface water continued to migrate to its land from the polluted Hanna land.

Id.

> [The plaintiffs' efforts] are slowing the plume of contamination which is emanating from the Hanna site.

Findings of Fact and Conclusions of Law at 5 (October 29, 1992).

> Although the action by plaintiffs did not eliminate the source of the petroleum, which is the soil on the Hanna site, they reduced the amount of pollutant in the groundwater. In this sense, their action benefitted the public.

Id. at 2.

Thus, it appears clear from the court's findings that there has been a release of gasoline from the property, originating prepetition, that has continued postpetition and will continue until the source of the release is removed.[18]

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[18]The court also found that there has been no significant postpetition contamination. In view of the statements quoted above, this finding reflects the court's understanding that postpetition liability against the estate could be predicated only on postpetition releases from the removed ruptured storage tanks.

CONCLUSION

The bankruptcy court's conclusion that Gull is not entitled to administrative status for its postpetition costs is an error of law. Even though the debtor initially created the harm, the trustee's succession to ownership of the property was attended by a responsibility to abate the ongoing downhill release of contaminant under Oregon law. This responsibility did not stop at his property line. Gull is entitled to first priority administrative expense status for its postpetition costs associated with remediation of the ongoing release from the contaminated soil. That part of the order denying administrative status for postpetition costs should be reversed. I therefore respectfully dissent.

ORS 465.255
42 USC §9607(a)(4)
trespass
nuisance

Gull Industries, Inc. v. Hanna Adv No 90-3388-S

In re Hanna Case No 390-33990-S11

10/29/92 ; DDS Unpublished

The court allowed Gull/BP an unsecured non-priority claim for the expenses they had incurred to clean petroleum from the water under their property. The petroleum migrated from the debtor's property to Gull's neighboring property. The petroleum leaked from the tanks pre petition, but continued to migrate post petition.

The liability arose under ORS 465.255, which holds an owner of a facility strictly liable for the remediation costs incurred by the state or any other person. The debtor owned the property during the time the petroleum was released into the ground. Alternatively, the claim was allowable as a prepetition nuisance or trespass.

The claim was not entitled to administrative priority for the reasons stated in a memo dated 4/7/92 (P92-9). The trustee was ordered to clean up the estate property.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	Bankruptcy Case No. 390-33990-S11
DANIEL C. HANNA, Debtor,	Adversary Proceeding No. 90-3388-S
GULL INDUSTRIES, INC., a Washington corporation and BP OIL COMPANY, an Ohio corporation, Plaintiffs, v. JOHN MITCHELL, INC., Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW

The debtor and Gull Industries operated gas stations on adjacent lots. Before the debtor filed chapter 11, gasoline from his station leaked into the groundwater and migrated under Gull's property. Gull sold its property to BP, but remained responsible for part of the environmental cleanup. The plaintiffs sought administrative expense treatment for the costs they had incurred in installing and

operating the recovery wells to remove the petroleum from the groundwater under their land.

I denied administrative status to their claim, and deferred a decision on the amount and allowability of the general claim for further briefing. After post-trial briefing, a hearing on August 18, 1992, and additional memoranda, a final judgment should be entered in this case allowing plaintiffs a general unsecured claim against the estate in the amount of $129,420.00, denying administrative expense status to the claim, and ordering John Mitchell, Inc. to clean up the Hanna property at 80 East Burnside. My reasons follow, and supplement the memorandum issued on April 7, 1992.

Based on my earlier findings after trial, I concluded that petroleum released on the Hanna site pre-petition migrated into the groundwater and under the property owned by plaintiffs. The soil on the Gull/BP property was also contaminated, but the gasoline in their soil had not reached the groundwater before it was removed. In conjunction with the cleanup of their property, plaintiffs installed recovery wells and an air stripper to clean the groundwater under their property. Although the action by plaintiffs did not eliminate the source of the petroleum, which is the soil on the Hanna site, they reduced the amount of pollutant in the groundwater. In this sense, their action benefitted the public.

The plaintiffs' claim is outlined on trial exhibit 17, and in their claims numbered 501 and 1169. The costs were incurred as a response to the petroleum spills on the Hanna site, because the contamination on the plaintiffs' property did not reach the groundwater. The claim is the amount spent by plaintiffs through the date the Hanna property was transferred to Rub-A-Dub, Inc. in accordance with the confirmed plan of reorganization in the Hanna chapter 11.

Hanna's liability to plaintiffs arises under ORS 465.255 and 466.825. The first statute holds an owner of a facility strictly liable for the remedial action costs incurred by the state or any other person when the costs are attributable to a facility owned by the person during the time of the acts or omissions that resulted in the release that injured the natural resources. Hanna owned the property during the release. The release of gasoline on the Hanna site leached through the soil and into the groundwater. The groundwater is a natural resource owned by the State of Oregon. ORS 465.200(10) and 537.110.

Gasoline is a hazardous substance under ORS 465.200(9)(c) and (11), and contains known or suspected carcinogens. Based on the evidence, I find that the actions taken by plaintiffs were remedial as that term is defined in ORS 465.200(15). The recovery wells, air stripper and monitoring wells could be consistent with a permanent

remedial solution to the cleanup of the gasoline in the groundwater, although they will not be very effective until the soil on the Hanna property is cleaned or removed. The plaintiffs were advised by specialists to install the wells. Based on the regulations and the acknowledgements by the chapter 11 trustee of the Hanna case that the estate would clean up the Hanna site, plaintiffs proceeded as they were advised.

The language of ORS 465.255(1) creates a private cause of action for someone who helps to clean the environment when the damage was caused by another person. This is consistent with 42 U.S.C. § 9607(a)(4)(B), CERCLA, which creates a private cause of action. Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 890 (9th Cir. 1986).

The defendant argued that ORS 465.255(1) requires compliance with state rules regarding cleanup as a prerequisite for recovery of remedial action costs. The Oregon Department of Environmental Quality (DEQ) submitted a brief as amicus curiae. The DEQ interprets ORS 465.255(1) to merely require that remedial action costs be reasonable to be recoverable. The DEQ stated that compliance with the DEQ rules and ORS 465.315 are indicative of reasonableness, but not a prerequisite to recovery. In this respect, the Oregon statute differs from 42 U.S.C. § 9607(a)(4)(B) which imposes liability on a responsible person only if the costs of response incurred by a person other than the government are

both necessary and consistent with the national contingency plan. I will adopt the DEQ's interpretation of the statute as more consistent with the legislature's intent to remove hazardous substances from the environment and protect the public.

While I am not convinced that the plaintiffs' remedial action expenses were cost effective or that they used permanent solutions, they did provide testimony to indicate that they are slowing the plume of contamination which is emanating from the Hanna site. Rather than speculate on the effectiveness of the plaintiffs' actions, defendant should have provided evidence to rebut the testimony of Mr. Laakso (trial transcript pp. 148-191) and Mr. Carlson. The most convincing evidence would have been a site characterization and investigation as required by OAR 340-122-225 and 340-122-230, and the supplemental reports and corrective action plan required by the administrative rules. I denied the plaintiffs' claim administrative status partly because they did not pursue the investigation and cleanup of the Hanna property. However, I will not go so far as to deny their claim entirely as unreasonable because the trustee agreed to perform the initial abatement measures and site characterization almost two years ago. He consistently assured this court that he recognized the estate's liability to clean up the site and he was required by ¶ 11.11 of the confirmed plan of reorganization to spend $30,000 to

remediate the site by December 31, 1991. The investigation should have been performed before the trial. Therefore, I will infer that the tests would be consistent with the conclusions of the plaintiffs' experts. They believe that the petroleum is migrating from the Hanna site to the Gull site, and that the plaintiffs' recovery wells are containing the spread of the contamination. Based on these conclusions, I will allow the plaintiffs' claim in full.

Part of the claim could also be supported by ORS 466.825. That statute renders the owner of a leaking underground storage tank (UST) liable to any owner of a non-leaking UST in the vicinity for all costs reasonably incurred in determining which tank was the source of the release.

The claim is a general unsecured claim because the gasoline was released pre-petition, and is not an administrative tort and did not significantly assist the trustee in removing the source of the pollution on the Hanna site. My reasoning in denying administrative status is more thoroughly explained in the memorandum entered April 7, 1992.

Alternatively, I will allow the claim as a pre-petition trespass or public nuisance which caused special harm to Gull. See, Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363 (Or. 1976). The gasoline was mainly in the groundwater and only affected the plaintiffs' land about eighteen feet below the surface, where the level of the

groundwater rose to touch the dirt. While this would not necessarily prevent the plaintiffs from using the land as a filling station, the concern over the subsurface contamination affected the price that Gull was able to receive when it sold the land to BP. The damage occurred pre-petition, and is also only entitled to treatment as a general unsecured claim.

As the trustee of the Hanna chapter 11 estate, and the liquidating trustee, John Mitchell, Inc. should be ordered to immediately begin to clean up the Hanna property at 80 East Burnside in accordance with state rules.

A separate final judgment will be entered.

DATED this 29th day of October, 1992.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Leon Simson
John Mitchell
Ronald T. Adams
John C. Cahalan
Andree Pollock
Kurt Burkholder
Wilson C. Muhlheim